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IN THE

Supreme Court of the United States

October Term 1966

NO. 1126

CLARA L. WASHINGTON, *Petitioner*

v.

GOLDEN STATE MUTUAL LIFE INSURANCE COMPANY, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals (App. A of Petition) is reported at 405 S.W.2d 856. The opinion of the Supreme Court of Texas (App. A of Petition) is reported at 408 S.W.2d 227.

JURISDICTION

If this Court has jurisdiction to review the judgment of the Supreme Court of Texas it is only under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the trial court deny petitioner due process and equal protection of the laws by proceeding with the hearing on respondent's motion for summary judgment when counsel for both parties appeared and argued the merits without making any objection to holding the hearing?

STATEMENT

This is a suit on an insurance policy in which respondent moved for summary judgment. On January 31, 1966, attorneys for both petitioner and respondent appeared before the trial court (Tr. 32)* for a hearing on respondent's motion. The trial court heard evidence in the form of affidavits (Tr. 32) and argument of counsel on the merits and announced that it would grant the motion. Up to this time petitioner had not raised any objection to the court's proceeding with the hearing. However, later the same day petitioner filed a multi-headed motion (Tr. 30) in which she claimed (1) that the court should not have proceeded with the hearing on the respondent's motion for summary judgment because petitioner had not had the ten days notice of hearing provided for by the Texas Rules of Civil Procedure and (2) that summary judgment was improper as a matter of substantive law. On February 24, 1966, judgment that the petitioner take nothing by reason of her suit against respondent was signed and entered (Tr. 32) and petitioner then attempted to perfect an appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

Respondent moved the Court of Civil Appeals to dismiss the appeal for want of jurisdiction because of late filing

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*All references are to the Transcript of Record prepared by Hon. R. J. Lindley, District Clerk, Harris County, Texas.

of petitioner's appeal bond. On July 7, 1966, the Court of Civil Appeals filed a written opinion holding that it had acquired no jurisdiction because of late filing of petitioner's appeal bond and ordering the appeal dismissed for lack of jurisdiction. (App. A of Petition)

Petitioner then applied to the Supreme Court of Texas for a writ of error and on November 9, 1966, that court filed a written opinion approving the opinion and the holding of the Court of Civil Appeals and refusing the application for writ of error. Under Texas law this amounted to an affirmance of the action of the Court of Civil Appeals in dismissing the appeal for lack of jurisdiction. The merits of the appeal again were not reached. (App. A of Petition)

On December 7, 1966, petitioner's motion for rehearing was overruled by the Supreme Court of Texas and exactly ninety days later on March 7, 1967, the petition for writ of certiorari was filed in this Court.

REASONS FOR NOT GRANTING THE WRIT

1. The case presents no substantial federal question. Petitioner claims that although her attorney participated in the hearing on respondent's motion for summary judgment without making any objection to the court's proceeding, the court denied her due process and equal protection of the laws by proceeding when there was a claimed problem of notice not raised by petitioner until after the hearing was concluded. She further claims that the due process and equal protection clauses of the Fourteenth Amendment somehow compel the appellate courts of Texas to correct this claimed error on the part of the trial judge despite the fact that the Texas appellate courts could acquire no

jurisdiction of her appeal from the district court judgment because of the late filing of her appeal bond. In other words petitioner wants this Court to correct a claimed error of a Texas trial court which the Texas appellate courts had no jurisdiction to correct. This is a classic case of a "federal question" so absolutely devoid of merit as to be frivolous. Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902).

Petitioner also failed to raise the question sought to be reviewed in a proper and timely manner in the state courts. Petitioner's due process and equal protection claim in connection with the hearing was not made at that hearing nor was it made in the written motion filed by petitioner on the day of the hearing. (Tr. 30) Petitioner only got around to asserting the constitutional claim in her motion for new trial (Tr. 33, Petition 6) after judgment had been entered in favor of respondent. When respondent moved to dismiss petitioner's appeal in the Court of Civil Appeals petitioner countered with a paper called Opposition to Motion to Dismiss Appeal (Petition 6) which claimed that repondent's construction of the Texas requirements for the perfection of appellate jurisdiction, if accepted by the appellate court, would be violative of the Fourteenth Amendment. No claim was made in that paper that the trial court's action in proceeding with the hearing raised any federal constitutional problem, although this claim was made in a brief filed by appellant on July 18, 1966, some eleven days after the Court of Civil Appeals dismissed the case for want of jurisdiction. (Br. App. 3, Petition 7) No constitutional claim concerning the trial court's action in proceeding with the hearing was made in petitioner's motion for rehearing in the Court of Civil Appeals or in petitioner's application for writ of error in the Supreme

Court of Texas.[1] Petitioner's failure to raise the constitutional claim concerning the trial court's action in proceeding with the hearing by assignment of error in her motion for rehearing in the Court of Civil Appeals[2] and by point of error in her application for writ of error in the Supreme Court of Texas[3] constituted a waiver of this claim under Texas law. Because petitioner has failed to preserve the claim in accordance with Texas practice, review in this Court is precluded. Beck v. Washington, 369 U.S. 541, 549-53 (1962).

2. The judgment of the Supreme Court of Texas rests on adequate and independent state grounds within the meaning of this Court's decision in Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Petitioner concedes (Petition 7) that the Texas Court of Civil Appeals did not reach the federal question sought to be reviewed and of course the Supreme Court of Texas did not do so. (App. A of Petition) Petitioner does not attack the Texas procedural rules requiring certain appellate steps to be perfected within prescribed time limitations nor does she contend that the Texas courts have failed to uniformly apply these

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1. Petitioner's only constitutional claim in her motion for rehearing in the Court of Civil Appeals and in her application for writ of error in the Supreme Court of Texas consisted of her naked allegation that the interpretation of the Texas Rules governing appellate steps somehow violated the Fourteenth Amendment. (Motion for Rehearing 2, 5; Application for Writ of Error 2, 6, 7; Petition 7, 8).

2. Tex. R. Civ. P. 458; East Texas Motor Freight Lines v. Loftis, 223 S.W. 613 (Tex. 1949); Moore v. Dilworth, 179 S.W.2d 940 (Tex. 1944); Calvert, **Some Problems of Supreme Court Review**, 21 Tex. B.J. 75, 76 nn. 13, 15 (1958) and accompanying text.

3. Tex. R. Civ. P. 476; City of Deer Park v. State, 275 S.W.2d 77, 84 (Tex. 1955); Tips v. Security Life & Acc. Co., 191 S.W.2d 470, 472 (Tex. 1945); London Terrace, Inc. v. McAlister, 180 S.W.2d 619, 622 (Tex. 1944); Calvert, **supra**, at 76 n. 16 and accompanying text.

rules to all Texas litigants. All petitioner asks is that this Court review the judgment of the Supreme Court of Texas on a question of state law. It is well settled that state courts speak with final authority on state law questions, *e.g.*, Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875), and that there can be no review if the state court has decided the case exclusively on some ground of state law and has never reached a federal question present in the case. McCoy v. Shaw, 277 U.S. 302, 303 (1928).

CONCLUSION

For these reasons the petition for writ of certiorari should not be granted.

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